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February 25, 2004

This Opinion is Not
Citable as Precedent
of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Parisi

Serial Nos. 75291235 and 75354127

Michael J. Calvey of Calvey & Amon, LLP for Dan Parisi.

Anne Madden, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Hairston, Chapman and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Dan Parisi, an individual United States citizen, has applied to register on the Principal Register WHITEHOUSE as a trademark for "printed publications, namely, magazines featuring adult entertainment," in International Class 16,¹

¹ Serial no. 75354127, asserting, in the application form itself, August 1, 1997 as the date of first use and first use of the mark in commerce. The heading for the drawing sheet for this application lists July 1, 1997 as the date of first use and first use in commerce. The Office relied on the dates set forth in the signed application rather than in the unsigned drawing, as have we.

and as a service mark for services ultimately identified as "providing entertainment featuring adult subject matter via a multi-user global computer information network," in International Class 41.²

The current examining attorney assumed responsibility for review of both applications after issuance of an initial refusal of registration in each. She issued one final refusal supported by very extensive, albeit duplicative, exhibits, stating that it applied to each application. Applicant thereafter appealed the refusal in each case. The main brief for the applicant addressed the refusals issued in both applications. The examining attorney, noting that the application for registration of WHITEHOUSE as a mark for magazines had been abandoned, filed a main brief only in regard to the application for registration of WHITEHOUSE as a mark for applicant's website. Subsequently, the abandoned application was revived and the examining attorney filed a main brief in that case. Applicant filed a consolidated reply brief. An oral hearing was held at which both applicant's counsel and the examining attorney appeared.

² Serial no. 75291235, asserting April 1, 1996 as the date of first use and first use of the mark in commerce. For ease of reference, we will refer to this application as the one seeking registration of WHITEHOUSE for applicant's website.

Each application has been refused under Sections 2(a) and 2(e)(1) of the Lanham Act, 15 U.S.C. §§ 1052(a) and 1052(e)(1), and on the ground that there is insufficient evidence of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), to overcome the Section 2(e)(1) refusal. We address each refusal in turn, addressing, as necessary, differences in the record or legal analysis attributable to the fact that one application seeks registration of a mark for a publication and one seeks registration for a web site.

The Section 2(a) Refusals

In regard to the first refusal, based on Section 2(a), the examining attorney asserts that The White House is a juristic person, insofar as that term stands for the executive branch of the government of the United States; that the building in which the president of the United States resides while in office is a national symbol;³ and that WHITEHOUSE, as used by applicant, falsely suggests a connection with such juristic person and symbol. We find the examining attorney's conclusion in error and reverse

³ We use WHITEHOUSE to refer to that which applicant seeks to register as a mark and White House or The White House to refer to the executive branch and the building at 1600 Pennsylvania Avenue, N.W., Washington, DC.

the refusal of registration based on this section of the Lanham Act.

We agree with the examining attorney that the president, the cabinet and the upper levels of the executive branch of the government of the United States may broadly be referred to as The White House, and that such term is used to identify one or more juristic persons within the executive branch. We note, in this regard, the dictionary definition defining White House as "the executive department of the U.S. government" (exhibit W to final refusal of registration) and the article excerpts retrieved by the examining attorney from the NEXIS database that discuss various lawsuits brought against The White House (exhibit Y to final refusal).⁴ We also agree that the residence of the president, named the White House, is widely regarded as a national symbol (NEXIS excerpts in exhibit X to final refusal).

There can be no doubt that use of The White House to identify the upper levels of the executive branch and the residence of the president antedate any use of WHITEHOUSE by applicant, for his magazine or his website. In re North

⁴ For the analysis we must bring to bear on the involved applications and record, it matters little whether we consider the executive branch to be a juristic person or an institution.

American Free Trade Association, 43 USPQ2d 1282, 1284 (TTAB 1997) citing In re Nuclear Research Corp., 16 USPQ2d 1316, 1317 (TTAB 1990) ("the phrase 'falsely suggest a connection with' in Section 2(a) necessarily requires by implication that the person or institution with whom a connection is suggested must be the prior user").

Applicant argues, nonetheless, that there are so many uses of "Whitehouse" - for example, as a surname, as a business name, as a geographic place name for various towns or cities, and even as the name of the building in which the Russian parliament sits - that the term cannot be "unmistakably" associated with either the political institution that consists of the upper levels of the executive branch of the government of the United States, or the national symbol that is the residence of the president. Applicant, however, has put in no evidence to establish that, as he asserts, Whitehouse is the name of various cities or towns. Further, the evidence on which he relies to establish that Whitehouse is a common surname and that Whitehouse or White House is a frequently used term in business names is not probative. The surname evidence purports to be a list of names, addresses and telephone numbers for various individuals. Applicant has not, however, stated the source of this list, and the list

itself bears no indication of its source. The same is true of the list of purported businesses including the term Whitehouse or White House in their names.

In further support of his assertion that Whitehouse is not unmistakably associated with The White House, applicant has also put in the record search reports from a private search firm showing that various marks including the term Whitehouse have been registered in various states, in Canada and in various European countries; and has submitted a list of purported federally registered marks including the term Whitehouse or White House. This evidence concerning other marks is of limited, if any, value. Applicant's proffer does not include information on the status of the state, Canadian or European registrations, not to mention any indication about the extent of use, if any, of these marks. Likewise, the list of federal registrations lists only marks, not goods or services, register information, disclaimers or other explanatory information, or status.⁵

⁵ In addition, many of the marks in the list of purported federal registrations are not for Whitehouse, but for foreign terms, such as Maison Blanche or Casa Blanca, which do not bear on the question of whether consumers would consider Whitehouse to be unmistakably associated with the executive branch or the presidential residence, for there is no evidence that either is referred to by foreign equivalents.

Notwithstanding the infirmities afflicting much of applicant's evidence on the question whether Whitehouse is widely used by individuals or other entities besides the The White House, there is at least sufficient probative evidence on which to conclude that the term is not only associated with The White House. Cf. West Florida Seafood Inc. v. Jet Restaurants Inc., 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (Evidence should be considered in its entirety, not by undue focus on individual items). The examining attorney does not dispute that the record shows "White House" is also the name of a Russian government building; that a fruit products company uses "White House" as a trademark for its products; that the term appears in other trademarks; and that it is a surname and used in business names.

The examining attorney essentially contends that it is sufficient for the Section 2(a) refusal if the term Whitehouse or White House is predominantly used to refer to The White House, even if there are other uses. Applicant disagrees that this is sufficient, and we believe he is correct in arguing that the law of Section 2(a) requires more than that the term in issue be more prominently or more often associated with one entity (in this case, the executive branch or a national symbol) than another (a

Russian government building, a fruit products company, or as an individual's surname). See The University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 703 F.2d 1372, 217 USPQ 505, 509 (Fed. Cir. 1983) (Section 2(a) requires that the name or mark claimed to be appropriated must be "unmistakably associated with" the particular entity and "point uniquely" to it). Compare the Notre Dame case (where an opposition based on Section 2(a) was dismissed because Notre Dame was found not to be solely associated with the plaintiff university) with the North American Free Trade Association case, 43 USPQ2d at 1286 (where NAFTA was refused registration under Section 2(a) because it did "not have a variety of well-known meanings" and would be associated with the North American Free Trade Agreement).

We do not find the case law to preclude a false suggestion of a connection merely because there may be some obscure individual or entity with the same name or mark, but the case law clearly requires more than that the use of the name or mark is most often associated with a particular individual or entity. See, e.g., In re Cotter & Co., 228 USPQ 202, 204-05 (TTAB 1985) (though "West Point" may have been a city or town in New York state, the Board found the

"term has come to be solely associated with and points uniquely to the United States Military Academy").

The Notre Dame case also holds that if we were to find evidence of record of an intent by applicant to identify The White House by his use of WHITEHOUSE, that "would be highly persuasive that the public will make the intended false association." Notre Dame, 217 USPQ at 509. There is evidence in the record, in the form of many NEXIS excerpts from articles based in part on interviews of applicant concerning his website, that applicant adopted WHITEHOUSE as a mark for his website⁶ for the purpose of creating a site dealing with politics and parody of politicians and political subjects. This evidence also suggests that the website actually was used for such purposes, for a time, but was not generating any money. Thus, applicant transformed his website to one with adult content.⁷

⁶ In essence, when we discuss applicant's adoption of WHITEHOUSE as a mark, we are necessarily referring to his acquisition of the domain name WHITEHOUSE.COM and use of that as the address of his website. The record does, however, show use of WHITEHOUSE per se on the website.

⁷ See for example, an article in the Los Angeles Times of March 2, 1998:

Parisi says he started the site as a political parody but "after investing about \$30,000 in it, I wasn't making any money." He then read a newspaper story about how adult Web sites were making money. "I asked my attorneys and they said that it wouldn't be a trademark violation for me to use the name 'Whitehouse' for an adult site." *continued...*

We cannot tell from the record whether applicant's web site ever was devoid of sexual imagery or whether, even when he was engaged in political parody, the site's content was essentially sexual. The record includes a declaration from applicant that he purchased the domain name in May 1997 and a NEXIS excerpt of a story in the Chicago Daily Herald of September 23, 1997 reporting that the site "treats visitors to a fake photo of a shirtless Bill Clinton wearing a dog collar as a leather-clad Hillary leads him around on a leash. This is followed by an extensive listing of X-rated web sites...."

We do not believe that the Notre Dame statement on the persuasiveness of evidence of intent has application in this case. This Board has previously held that the question of whether a proposed mark falsely suggests a connection with the federal government, or a branch or

See also an excerpt from an article in the San Francisco Chronicle of June 3, 1998:

After plunking down \$10,000 to buy the rights to www.whitehouse.com in May 1997, Dan Parisi of Secaucus, N.J., started the site as a "pure parody of U.S. politics," but few cared.

"I was losing \$10,000 a month until I discovered how popular adult sites are," Parisi said.

While we recognize the hearsay problems inherent in such evidence, there are numerous stories in numerous publications repeating the same basic explanation of how applicant's web site came to its current incarnation (including asserted quotations of applicant). Moreover, applicant has not, in briefing the appeal, suggested that any of the NEXIS evidence put in by the examining attorney suffers from errors in its content.

agency thereof, "must be determined on a case-to-case basis in connection with the specific goods or services with which [the proposed mark] is used and the impact of such use upon the relevant section of the purchasing public."

In re National Intelligence Academy, 190 USPQ 570, 572 (TTAB 1976). See also, In re Cotter, supra, and In re U.S. Bicentennial Society, 197 USPQ 905 (TTAB 1978).

In each of the three cases cited above, the products or services were of a type such that prospective purchasers might reasonably believe there were some government authorization if not origin. In contrast, see Heroes Inc. v. The Boomer Esiason Hero's Foundation Inc., 1997 WL 335807, 43 USPQ2d 1193, 1197 (D. D.C. 1997), wherein defendant alleged in a counterclaim under Section 2(a) that plaintiff's registered service mark falsely suggested a connection with the United States government. The court dismissed the counterclaim on a motion for summary judgment, notwithstanding inclusion of a representation of the U.S. Capitol building in the composite word and design mark, because the government "does not ordinarily provide charitable services," and consumers would not think otherwise. Id.

It appears beyond dispute that applicant acquired the domain name WHITEHOUSE.COM for his asserted political

parody site precisely because it would conjure up thoughts of The White House, and, to that extent, intended an association between his site and The White House. On the other hand, when we consider the involved application to register WHITEHOUSE as a mark for a website "featuring adult subject matter," it is not reasonable on this ex parte record to conclude that applicant intended prospective visitors to his site to think that it was sponsored or authorized by The White House. Thus, we do not find evidence of the kind of intent that the Federal Circuit indicated, in Notre Dame, would serve in lieu of evidence of an unmistakable and unique association of applicant's WHITEHOUSE with The White House.

The examining attorney has placed great emphasis on the mistaken visits by many individuals to applicant's website,⁸ thinking that they were accessing the WHITEHOUSE.GOV website of The White House. However, the mere knowledge by applicant that he might attract visitors who were careless in typing web addresses, or who would, by certain web browsers, be directed to his site by default

⁸ The record is replete with NEXIS excerpts from stories recounting visits by the unsuspecting to applicant's website, and of concerns among many, including members of Congress, that these unsuspecting web surfers, including children, have been exposed to applicant's web site when they intended to visit the WHITEHOUSE.GOV website of The White House.

when a web surfer typed WHITEHOUSE but neglected to add a top-level-domain, is not sufficient to show an intent to cause prospective visitors to his site to conclude that it was officially sponsored or authorized by The White House. Mere generation of traffic for applicant's website in this manner is not equivalent to intent to cause consumers to falsely conclude that applicant's web site is a site maintained by or authorized by The White House.

On this record, we cannot conclude that "Whitehouse" is a term so uniquely and unmistakably associated with The White House, or intended by applicant to be taken by consumers as falsely suggesting a connection between his website "featuring adult subject matter" and The White House, that refusal under Section 2(a) is warranted. Accordingly, we reverse the refusal to register under Section 2(a) as to applicant's application to register WHITEHOUSE as a mark for his website.

Turning to applicant's application to register WHITEHOUSE for a magazine, we note that the record contains little information indicating that this is a significant enterprise for applicant. The copies of applicant's magazine submitted for the record include no advertising, as a typical magazine would, and applicant essentially has acknowledged the magazine is a means for promoting

applicant's website. For largely the same reasons discussed above in regard to applicant's website, we reverse the refusal under Section 2(a) as to applicant's application to register WHITEHOUSE as a mark for his magazine "featuring adult entertainment." There is nothing in the record to establish that The White House publishes magazines with such content or that consumers would think The White House authorized such publications.

The Section 2(e)(1) Refusals

We now consider whether applicant should be refused registration of WHITEHOUSE as a mark for his magazine and website on the ground that the term is descriptive or deceptively misdescriptive. The examining attorney, in her discussion of the refusals under Section 2(e)(1), includes only one paragraph addressed to an alternative theory of deceptive misdescriptiveness. It is clear that this is only an alternative and that the significant issue is whether WHITEHOUSE is a descriptive term when used on or in connection with applicant's magazine and website.

In essence, the examining attorney argues that both the website and magazine have featured items that parody political figures, including residents of The White House or those who have aspired to the presidency. Applicant

essentially argues that WHITEHOUSE is arbitrary as applied to both its magazine and website. Moreover, applicant contends that he has ceased using the business cards that promoted the website as featuring "government entertainment."

We consider the magazine first. Titles for publications such as newspapers and magazines often present perplexing problems, because of the tendency of their publishers to use the titles to convey some idea of the content of their publications. See H. Marvin Ginn Corp. v. Int'l Assn. Of Fire Chiefs, 782 F.2d 987, 228 USPQ 528, 530-31 (Fed. Cir. 1986). As a result of this tendency, many reported cases dealing with titles of publications focus on the question of whether the asserted marks are descriptive or generic, not descriptive or suggestive. See Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 222 USPQ 839, 841 (7th Cir. 1984); Scholastic, Inc. v. MacMillan, Inc., 650 F.Supp. 866, 2 USPQ2D 1191 (S.D.N.Y. 1987). As was the case for the Scholastic court, however, "the difficulty of discerning between descriptive and generic" need not concern us; applicant argues that his mark is not descriptive but arbitrary.

"A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or

characteristics of the goods [or services]." In re Abcor Development Corporation, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 189 USPQ 759, 765 (2nd Cir. 1976). Abcor also reminds us that the determination of whether a term is descriptive is to be made from the perspective of the average prospective purchaser. Abcor, supra, 200 USPQ at 218. Moreover, the determination is made not by considering the term in the abstract but by considering it in relation to the identified goods or services, and in the context within which the term is used. Id.

Earlier, in discussing the Section 2(a) refusal, we noted that it was insufficient for the examining attorney to establish that the predominant meaning for "White House" is The White House. In the context of the Section 2(e)(1) descriptiveness refusal, however, this is significant. The record shows that the definition for White House in the dictionary is as the executive branch or the residence of the president of the United States. The NEXIS excerpts tend to establish that many individuals searching for information on The White House do so simply by typing WHITEHOUSE into a web browser search line.

In his application to register WHITEHOUSE as a title for a magazine featuring adult entertainment, applicant has

submitted as specimens copies of two issues of his magazine. Both bear the legend, on the bottom front cover, "A Magazine of Parody and Adult Entertainment." One issue includes a constructed photo of a female figure with Monica Lewinsky's head. On its inside cover are photos of former President Clinton. Its interior pages (including the front and back covers the magazine totals 8 pages) include an "article" titled "ICANN Domain System?" and which states "President Clinton through an executive order privatized the system." Finally, on the back cover of the magazine is a spoof of a STAR WARS movie poster titled "STARR WARS" and which features images of former special prosecutor Kenneth Starr, President and Mrs. Clinton, and Monica Lewinsky. In short, this issue of the magazine includes a good deal of content focusing on the Clinton White House. The other issue of the magazine (12 pages, including covers) in the record includes an article on the 2000 presidential election and numerous cartoons lampooning candidates.⁹

Considering applicant's proposed mark WHITEHOUSE in this context, we have no doubt that the title of applicant's magazine "forthwith conveys an immediate idea" about a significant feature thereof. Specifically, because

⁹ This issue appears to have been published prior to the nominations of former Vice President Al Gore and current

"White House" is defined in the dictionary to mean the executive branch of the government of the United States and applicant's magazine includes content focusing on presidential politics, the term WHITEHOUSE describes such content. See Scholastic Inc. v. Macmillan Inc., 650 F.Supp. 866, 2 USPQ2d 1191 (S.D.N.Y. 1987) (CLASSROOM descriptive of magazine featuring material for teachers and students); American Association for the Advancement of Science v. The Hearst Corporation, 498 F.Supp. 244, 206 USPQ 605 (D. D.C. 1980) (SCIENCE descriptive of magazine featuring articles in the field of science); and In re Waverly Inc., 27 USPQ2d 1620 (TTAB 1993) (MEDICINE descriptive of content of medical journal).

We affirm the Section 2(e)(1) refusal to register WHITEHOUSE as a mark for applicant's "printed publications, namely, magazines featuring adult entertainment," in International Class 16.

We now turn to consider the Section 2(e)(1) refusal in regard to applicant's website. Among the items in the record are reprints of applicant's "home" page on the world wide web (dated June 23, 2000), and other pages accessed from the home page. (See exhibit V to the examining

president George W. Bush, as it includes cartoons regarding the candidacies of Bill Bradley and John McCain.

attorney's final refusal.) The home page (<http://www.whitehouse.com>) includes a link to photos of "WhiteHouse First Ladies"; includes the phrase "This WhiteHouse has been featured on ABCNews, CNN, C/Net, MSNBC, NBC DateLine, and Newsweek"; includes a disclaimer of affiliation with or endorsement by the government of the United States; and includes a link to MyWhiteHouse for news, stocks and sports information. A subpage or connected page (<http://www.whitehouse.com/whitehouse-cartoons/cartoons/whitehousecartoons1.html>) is entitled "WhiteHouseCartoons and Voting." This page features an image of The White House; manufactured or constructed photos of former president Clinton and former first lady Hillary Clinton; an invitation to become a member to see more cartoons; and a link to "view the money spent and received by the candidates."¹⁰ The cartoons page also offered visitors the opportunity to vote for either George Bush or John McCain as the Republican candidate for president, and reported on the results of an earlier poll, showing that visitors chose Al Gore over Bill Bradley as the Democratic candidate for president.

¹⁰ The listing shows monies purportedly raised and spent by nine candidates in the primaries for the 2000 presidential election.

An "archive cartoons" page includes additional enhanced or altered photos of the Clintons, Ross Perot and Jesse Ventura. There is also a page featuring photos of "WhiteHouse Interns."

An earlier version of applicant's homepage (dated April 7, 1999), submitted in support of a response to an Office action, includes a link to "LewinskyGate-The Song." Numerous NEXIS excerpts report that the website has had links to "Kenneth Starr's famous Starr Report."

It appears from the record that material of this nature was featured on applicant's website from at least September 1997 through June 2000 and thus presidential politics has been a constant subject of the site. The Chicago Daily Herald story referenced earlier in this decision reports the presence of White House-themed content on applicant's website as early as September 1997. Applicant acknowledges in his brief (p. 3) that former White House counsel Charles Ruff wrote a letter of complaint to applicant in December 1997. Many NEXIS excerpts in the record report the continuing presence of the White House-themed content on the website in 1998. Finally, reprints of applicant's home pages from 1999 and 2000 show the continuing presence of such content. We also note that the specimens of record for the application to

register WHITEHOUSE as a mark for applicant's website are business cards titled "WHITEHOUSE GOVERNMENT ENTERTAINMENT."

Considering applicant's proposed mark in this context, we have no doubt that WHITEHOUSE is descriptive when used in connection with applicant's website, as it readily identifies a subject with which the site has been consistently concerned, i.e., the occupants of The White House and presidential politics. The term is not rendered arbitrary, as applicant argues, by virtue of the website being one that offers "adult subject matter." Some of the information accessible at the site, such as the link to the Starr Report or information on campaign fundraising, has nothing to do with "adult subject matter," while other items, such as manipulated photos of occupants of The White House clearly would fall in the realm of that type of "adult subject matter." That applicant's website may contain both types of White House-themed content does not obviate the descriptiveness of the term WHITEHOUSE used on or in conjunction with the site.

Further, it is well settled that a term need not describe all aspects of a product or service to be held unregistrable as descriptive. It is sufficient if the term describes a significant feature of the product or service.

See In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980), In re International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). See also, In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

In this case, White House-themed content has been a significant, continuing feature of applicant's website. We therefore affirm the Section 2(e)(1) refusal to register WHITEHOUSE as a mark for applicant's service of "providing entertainment featuring adult subject matter via a multi-user global computer information network," in International Class 41.

The Section 2(f) Evidence

Applicant prosecuted each of his involved applications on the alternative theories that WHITEHOUSE is not descriptive for his magazine or website and, even if it were found to be descriptive, that the term has acquired distinctiveness under Section 2(f).

Our primary reviewing court has explained that a descriptive term may be registered on a "showing of acquired distinctiveness or secondary meaning." In re K-T Zoe Furniture Inc., 16 F.3d 390, 29 USPQ2d 1787, 1789 (Fed. Cir. 1994). "The showing that may be deemed adequate will

of course depend on the particular facts; the requisite weight of evidence will vary with the degree of descriptiveness of the mark. ... The evidence must relate to the specific [goods or] services set forth in the application, and the specific mark for which registration is sought. See *In re Failure Analysis Associates*, 1 USPQ2d 1144, 1146 (TTAB 1986)." Id.

In applications for registration, a claim of acquired distinctiveness or secondary meaning can be based on (1) ownership of prior registrations for the same mark, (2) a claim of five years of continuous and substantially exclusive use of the mark, or (3) actual evidence, whether direct or indirect, of consumer perception. See TMEP Section 1212 (3rd ed., rev. 2, May 2003). Applicant has not claimed ownership of any prior registrations for WHITEHOUSE, but has submitted evidence of the other two types.

Section 2(f) of the Lanham Act does not prescribe that a "five years of use" statement will be sufficient, and only provides the USPTO with discretion to accept such a statement as prima facie evidence of acquired distinctiveness. The examining attorney has rejected applicant's claim of five years of continuous and substantially exclusive use of WHITEHOUSE, asserting that

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it is insufficient to show secondary meaning in the term for either applicant's magazine or his website.

We agree.

It is clear that applicant had not actually been using the mark for five years for either his magazine or his website when he made the declaration of five years use on April 19, 2000. Applicant's declaration states that "the mark in question has been in continuous use as a domain name, under the '.com' top level domain, for over five years." In support of this statement, applicant offers an exhibit to show that the domain name was "created at least as early as January 21, 1995." Yet applicant also states that he did not purchase that domain name until May 1997. The record reveals that applicant purchased the domain name from L.Q. White's House of Gunz, but there is nothing in the record to indicate whether the previous owner was actually using the domain name and, if so, whether such use was in conjunction with a magazine featuring adult entertainment and/or a website featuring adult subject matter. Read carefully, applicant's declaration really is nothing more than a claim that WHITEHOUSE has been used in conjunction with the top level domain ".com" for five years and therefore "has attained a secondary meaning as a commercial [web] site." We find the declaration

insufficient by its own terms as a claim of five years of use of WHITEHOUSE as a mark for applicant's web site featuring adult subject matter¹¹ and we find the declaration claims no use whatsoever of the mark for a magazine featuring adult entertainment. The examining attorney correctly rejected the declaration as insufficient evidence of acquired distinctiveness for either of the involved applications. Washington Speakers Bureau Inc. v. Leading Authorities Inc., 33 F.Supp.2d 488, 49 USPQ2d 1893, 1896 n.3 (E.D. Va. 1999) (Registration of a mark or name as a domain name does not confer any federal trademark rights on the registrant).

In regard to what actual evidence there is that WHITEHOUSE has acquired distinctiveness as a mark for applicant's magazine, we find nothing in the record attesting to the number of subscribers to applicant's magazine, or to any advertising expenditures specifically promoting the magazine, as opposed to expenditures

¹¹ We also note that there are certain NEXIS excerpts which refer to use of WHITEHOUSE.NET and WHITEHOUSE.ORG for websites featuring pornography or adult subject matter. See, for example, the transcript of a CBS This Morning broadcast from March 16, 1999 (in exhibit D to the examining attorney's final refusal of registration) and an article in the SF Weekly, March 31, 1999 (in exhibit L to the examining attorney's final refusal of registration). These and other reports cast doubt on the veracity of applicant's claim to substantially exclusive use of WHITEHOUSE as a mark for a website featuring adult subject matter.

promoting his website. Moreover, the copies of the two magazine issues in the record tend to counter applicant's claim in the application that he has actually been using WHITEHOUSE for a magazine since August 1, 1997.

As the two issues comprise a total of only 20 pages, including covers, we have reviewed them in their entireties. One undated issue includes an inside statement that it is the first issue of a semi-annual series. The other issue, which states within its pages that it is the second issue, bears a January 2000 issue date.¹²

In essence, applicant's claim of acquired distinctiveness relies largely on unsolicited media coverage of his website and the asserted large number of visitors to his website. None of the evidence purportedly establishing these matters, however, specifically relates to use of WHITEHOUSE as a mark for a magazine. Rather, the record is virtually devoid of evidence that WHITEHOUSE has acquired distinctiveness as a mark for a magazine. Accordingly, we affirm the examining attorney's refusal to

¹² The self-proclaimed first issue includes a report that a new ICANN domain name system will be in place sometime in 1999 but also includes a report on the "IA2000" convention in Orlando. Thus, either the first issue came out sometime in early or mid-1999, with the second following in or about January 2000, or the magazine has not been published on its stated semi-annual basis.

accept applicant's claim that his mark is registrable under Section 2(f) for his magazine.

The last matter we must consider is whether applicant has provided sufficient evidence that WHITEHOUSE has acquired distinctiveness as a mark for his website. As noted earlier, our primary reviewing court has stated that evidence of acquired distinctiveness must "relate to ... the specific mark for which registration is sought." K-T Zoe, 29 USPQ2d at 1789. Thus, a significant threshold question is whether applicant may rely on unsolicited media coverage of his WHITEHOUSE.COM website as evidence that WHITEHOUSE alone has acquired distinctiveness as a mark for his website, for it is clear from the record that the WHITEHOUSE.COM website has received a great deal of media attention.¹³

There are at most a handful of NEXIS excerpts that discuss applicant in conjunction with a "White House" website. See, for example, The Boston Globe story of November 15, 1998 on ICANN as overseer of the internet, which refers to applicant as "an engineer for the White

¹³ Almost all of the media attention given applicant's website focuses on the assumption that applicant adopted the domain name to take advantage of inattentive or sloppy users of the internet who actually seek information on The White House, and whether there is anything that any governmental authority can do to halt use of the domain name.

House's web site." (This is within exhibit S to the examining attorney's final refusal.) Even here, however, it is unclear whether the author was referring to applicant's website or mistakenly thought applicant was an engineer for the website of The White House. In any event, almost every instance of unsolicited media reporting on the existence of applicant's website takes pains to point out that it is not the only "White House" website but, rather, that applicant's site is the WHITEHOUSE.COM website, and that it is very different in content from the WHITEHOUSE.GOV website.

Applicant, in his declaration of April 19, 2000, states in part that Whitehouse used in conjunction with ".com," "as opposed to any other type of site, such as a government related site under the '.gov' top level domain," "has thus attained a secondary meaning as a commercial site." We are not, however, faced with the task of deciding whether WHITEHOUSE.COM and WHITEHOUSE.GOV can be distinguished from each other by virtue of the top level domain designations each website employs. Rather, we are faced with the task of deciding whether all the unsolicited media attention accorded the WHITEHOUSE.COM website featuring adult subject matter has created a secondary meaning in the term WHITEHOUSE alone for applicant's

website. We find that it has not, precisely because such media attention has been pointed in drawing a distinction between WHITEHOUSE.COM and WHITEHOUSE.GOV.

Nor are we persuaded by the purported evidence of the number of visitors viewing applicant's website that WHITEHOUSE alone has acquired secondary meaning as a mark for that website.¹⁴ See DeGidio v. West Group Corp., 355 F.3d 506, 69 USPQ2d 1538, 1543 (6th Cir. 2004) (In discounting affidavits from visitors to a website, the court noted, "Mere use of a website does not equal identification with a particular provider." In addition, the court stated its agreement with the district court's rejection as irrelevant of evidence of "rankings by WebsMostLinked.com, a site that ranks websites based upon the number of other sites that link to them."). See also, 555-1212.com Inc. v. Communication House International Inc., 157 F.Supp.2d 1084, 59 USPQ2d 1453, 1459 (N.D. Cal. 2001) (In discounting declarations used to introduce reports on the number of visitors to a website as evidence

¹⁴ We note that we have reservations about the weight to be accorded the specific items of evidence that applicant has submitted to show frequent, large numbers of visitors to his site. Much of the material appears to be excerpts from larger reports and is without context or attribution other than by counsel's statements as to the source and significance of the material. Nonetheless, it is clear from the overall record that applicant's website is likely a frequently visited one.

of secondary meaning, the court said, "The Media Metrix report only provides that a large number of Internet users visit plaintiff's web site. It does not provide any reasonable inference to conclude that these users perceive plaintiff's domain name as a brand name instead of a merely descriptive Internet address."). Indeed, we have no way of knowing, based on the record before us, how many of the visitors to applicant's site are intentionally seek its adult subject matter, how many have made their way to the site by mistake (whether through sloppy web browsing or typing, or by being taken to the site when some unrelated domain name was typed into a web browser¹⁵), or how many went to the website in search of parodies of The White House and who would have viewed WHITEHOUSE.COM as descriptive of a site containing such content.

As for funds spent promoting applicant's website, we find the evidence sketchy and lacking credibility. We have, at best, reports by applicant's counsel of round numbers with no detailed information on specific means of promotion of applicant's website.

¹⁵ In regard to visitors being taken to applicant's website when they did not even so much as type the word WHITEHOUSE into a web browser, we note the numerous NEXIS excerpts that discuss another party owning a large number of domain names that web users would likely believe were affiliated with individual celebrities. These stories explain that web users searching for these

We affirm the examining attorney's refusal to accept applicant's claim that WHITEHOUSE is registrable under Section 2(f) as a mark for a website featuring adult subject matter.

We do not reach applicant's allegations that he has been refused registration as the result of a concerted, unconstitutional effort to prevent registration of his marks because of displeasure with the content of his website.

Decision: The refusal of registration under Section 2(a) of the Lanham Act, based on the argument that applicant's mark falsely suggests a connection with The White House, is reversed in regard to each application. The refusal of registration under Section 2(e)(1) that WHITEHOUSE is descriptive in regard to the goods or services in each of the involved applications is affirmed. Finally, the refusal to allow registration under Section 2(f), on the ground that the evidence of acquired distinctiveness is insufficient to show secondary meaning in WHITEHOUSE as a mark for applicant's goods or services is affirmed.

celebrity sites were, for a time, being forwarded automatically to applicant's website.